

STATE OF MICHIGAN  
COURT OF APPEALS

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HATTIE MOORE and JAMES MOORE,  
  
Plaintiffs-Appellees,

v

SECURA INSURANCE,  
  
Defendant-Appellant.

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FOR PUBLICATION  
July 3, 2007  
9:05 a.m.

No. 267191  
Genesee Circuit Court  
LC Nos. 01-071881-NF  
and 02-073203-NF

Official Reported Version

Before: Wilder, P.J., and Sawyer and Davis, JJ.

WILDER, P.J. (*dissenting*).

In this action for first-party personal protection insurance benefits<sup>1</sup> and uninsured motorist coverage, defendant appeals as of right the trial court's award of attorney fees. I would conclude that the award of attorney fees is clearly erroneous as a matter of law, and would reverse (or at least vacate the award and remand for further proceedings), because (1) the jury did not find that any benefits were overdue at the time of trial and (2) even if the attorney fees were permissible in light of the jury's verdict, the trial court erred by failing to determine which portion of the total attorney fees were attributable to the recovery of overdue benefits. Therefore, I respectfully dissent.

I

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<sup>1</sup> "What are commonly called 'PIP benefits' are actually personal protection insurance (PPI) benefits by statute. MCL 500.3142. However, lawyers and others call these benefits PIP benefits to distinguish them from property protection insurance benefits." *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66 n 4; \_\_\_ NW2d \_\_\_ (2007).

The accident at issue occurred in September 2000. Plaintiff Hattie Moore<sup>2</sup> fractured her right kneecap in the accident, causing a bone chip. Plaintiff had a preexisting osteoarthritic condition in her knees. Dr. Norman Walter, an orthopedic surgeon, had begun treating plaintiff's pain in her knees in November 1999. Dr. Walter testified that in February 2000 plaintiff was considering knee replacement surgery and injection treatments.

In January 2001, plaintiff underwent surgery to remove the bone fragment in her right knee. Following the surgery, Dr. Walter noted that plaintiff's right knee had improved. Dr. Walter was uncertain whether plaintiff's problems with her left knee were related to the accident.

Thereafter, defendant Secura Insurance appointed a nurse case manager to help determine plaintiff's ability to work. Dr. Walter twice failed to respond to the manager's request for information regarding work restrictions. Secura then had Dr. Charles Xeller conduct an independent medical examination (IME) in September 2001. In his October 4, 2001, report, Dr. Xeller concluded: plaintiff could return to work with certain restrictions; plaintiff would require total knee replacement of the left knee, not because of the accident, but because of osteoarthritic degeneration; plaintiff had good results from the surgery; and no further treatment was needed for the orthopedic complaints relating to the accident. In a supplemental report dated October 17, 2001, Dr. Xeller concluded that plaintiff's shoulder complaints were preexisting and not related to the accident.

Meanwhile, Secura had been paying wage loss and personal injury benefits for over a year following the accident. But as a result of Dr. Xeller's October 2001 IME reports, Secura discontinued plaintiff's first-party benefits in November 2001 on the basis that reasonable proof of the claim no longer existed. Secura contends that, before plaintiff commenced this action, it paid plaintiff overdue first-party benefits that had become overdue when a computer glitch delayed issuance and delivery of those benefits to plaintiff.

In April 2002, plaintiff filed this action to recover additional first-party benefits (plus uninsured motorist coverage, which is not at issue here). At trial, with respect to first-party benefits, plaintiff sought (1) approximately \$96,000 in wage loss, (2) approximately \$21,000 for household/replacement services, and (3) penalty interest of over \$11,000. The jury awarded \$98.71 in penalty interest, \$42,755 for unpaid wage loss benefits, and \$50,000 in non-economic damages for uninsured motorist coverage.

Plaintiff brought a motion for attorney fees under MCL 500.3148, arguing that the benefits awarded by the jury had been overdue and that Secura unreasonably denied or delayed payment of her wage loss claims. The trial court agreed, and awarded plaintiff attorney fees and costs of \$79,415.

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<sup>2</sup> Although the plaintiff's husband also brought a derivative claim, for ease of reference, Hattie Moore will be referred to as the plaintiff throughout this opinion.

## II

Attorney fees generally are not recoverable from the losing party in the absence of an exception set forth in a statute or court rule authorizing such an award. *Haliw v Sterling Hts*, 471 Mich 700, 707; 691 NW2d 753 (2005). "Exceptions to the doctrine that attorney fees are not recoverable are narrowly construed." *Spectrum Health v Grahl*, 270 Mich App 248, 253; 715 NW2d 357 (2006).

Under MCL 500.3148(1), "[a]n attorney is entitled to a reasonable fee for advising and representing a claimant *in an action for personal . . . protection insurance benefits which are overdue*." (Emphasis added.) Attorney fees are awardable "if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment." *Id.*

"Well-established principles guide this Court's statutory [or court rule] construction efforts. We begin our analysis by consulting the specific [statutory] language at issue." *Provider Creditors Comm v United American Health Care Corp*, 275 Mich App 90, 95; \_\_\_ NW2d \_\_\_ (2007) (internal quotation marks and citations omitted). "This Court gives effect to the Legislature's intent as expressed in the statute's terms, giving the words of the statute their plain and ordinary meaning." *McManamon v Redford Charter Twp*, 273 Mich App 131, 135; 730 NW2d 757 (2006), citing *Willett v Waterford Charter Twp*, 271 Mich App 38, 48; 718 NW2d 386 (2006). "When the language poses no ambiguity, this Court need not look beyond the statute or construe the statute, but need only enforce the statute as written." *McManamon, supra* at 136. "This Court does not interpret a statute in a way that renders any statutory language surplusage . . . ." *Id.*, citing *Pohutski v City of Allen Park*, 465 Mich 675, 684; 641 NW2d 219 (2002).

Under the unambiguous language of MCL 500.3148(1), there are two requirements for an award of attorney fees in a no-fault case: (1) the insurer unreasonably refused to pay or delayed paying the benefits, and (2) the benefits were overdue. *Roberts v Farmers Ins Exch*, 275 Mich App 58, 66-67; \_\_\_ NW2d \_\_\_ (2007) ("Attorney fees are payable only on overdue benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying.") (citation and emphasis omitted). I conclude that the second of these two requirements is not satisfied here.

## A

MCL 500.3142(2) provides that "[p]ersonal protection insurance benefits are overdue if not paid within 30 days after an insurer receives reasonable proof of the fact and of the amount of loss sustained." Here, the trial court instructed the jury<sup>3</sup> as follows:

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<sup>3</sup> The majority does not conclude or suggest that the trial court's instruction to the jury on the law governing this issue was erroneous. Neither do I.

Plaintiff is entitled to 12% interest on any benefit you find overdue. Benefits are overdue if not paid within 30 days after reasonable proof of the fact and amount of the loss has been provided to the insurance company. . . . If reasonable proof is not supplied as to the entire claim, *you shall award interest as to all benefits for which reasonable proof was supplied.*" [Emphasis added.]

The jury awarded plaintiff \$42,755 for wage loss. However, the jury awarded only \$98.71 of penalty interest for overdue benefits. Thus, the jury necessarily concluded that Secura unreasonably delayed payment of only \$822.52,<sup>4</sup> one week of wage loss benefits for which reasonable proof was provided.<sup>5</sup>

That the jury awarded plaintiff wage loss benefits in the amount of \$42,755 but only \$98.71 of penalty interest for overdue benefits is arguably inconsistent. However, a jury verdict must be upheld where ""there is an interpretation of the evidence that provides a logical explanation for the findings of the jury."" *Allard v State Farm Ins Co*, 271 Mich App 394, 407; 722 NW2d 268 (2006), quoting *Bean v Directions Unlimited, Inc*, 462 Mich 24, 31; 609 NW2d 567 (2000), quoting *Granger v Fruehauf Corp*, 429 Mich 1, 7; 412 NW2d 199 (1987). During the trial, evidence was introduced that during the time that Secura did not dispute plaintiff's entitlement to wage loss benefits, there was a three-month period during which Secura admittedly did not timely pay those benefits, allegedly because of a computer malfunction. Secura argued that only those wage loss benefits were overdue, and that because those overdue benefits had been paid well before the litigation commenced, the penalty interest owed on those admittedly overdue benefits was capped at \$121.50. The jury's award of only \$98.71 in penalty interest constitutes an acceptance of Secura's theory of the case that only the benefits actually paid before trial were overdue and thus entitled to interest. More importantly, the penalty interest award logically constitutes a rejection by the jury of the plaintiff's theory that plaintiff provided reasonable proof to Secura that the continued payment of wage loss benefits was warranted. If the jury had concluded that reasonable proof of wage loss had been provided to Secura at the time it discontinued wage loss benefits, the jury was required to award, and would have awarded, penalty interest on the \$42,755 it awarded plaintiff for wage loss. The jury obviously determined that the \$42,755 it awarded plaintiff for wage loss was not overdue, and followed the trial court's instructions accordingly.<sup>6</sup>

The majority characterizes as not "clearly erroneous" the trial court's finding that Secura's decision to terminate benefits after failing to "go beyond" the opinion of the IME doctor by

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<sup>4</sup> \$98.71 is 12 percent of \$822.52.

<sup>5</sup> The majority agrees that the jury award of penalty interest is for one week of delayed work loss benefits.

<sup>6</sup> As noted above, the trial court instructed the jury that "[i]f reasonable proof is not supplied as to the entire claim, *you shall award interest as to all benefits for which reasonable proof was supplied.*" [Emphasis added.]

consulting with the treating physicians or obtaining other information was unreasonable. I disagree, and would conclude, instead, that this finding is legally erroneous. The jury found that the \$42,755 it awarded plaintiff for wage loss was not overdue, because it did not award penalty interest on that amount. Under MCL 500.3148(1), an attorney is only entitled to a fee award for advising and representing a claimant "*in an action for . . . benefits which are overdue.*" (Emphasis added.) The statute does not permit recovery of an attorney fee in an action in which the plaintiff is awarded benefits that were reasonably in dispute, i.e., were not yet overdue. *Roberts, supra.*

My conclusion is consistent with this Court's holding in *Beach v State Farm Mut Automobile Ins Co*, 216 Mich App 612, 615; 550 NW2d 580 (1996). In that case, State Farm paid benefits for approximately three years following the accident in which Beach severely injured his face and head. Thereafter, the Michigan Department of Social Services referred Beach to a psychologist to determine his eligibility for a program to exchange volunteer work for welfare benefits. *Id.* The psychologist concluded that the residual effects of the accident had exacerbated Beach's preexisting learning disabilities, and recommended vocational and other rehabilitation services. *Id.* According to State Farm, Beach dropped out of school in the eighth grade, had low intelligence test scores, and suffered a prior closed head injury in a motorcycle accident. *Id.* State Farm refused to pay for the rehabilitation treatment because it could not determine whether the need for rehabilitation was related to the accident. *Id.* "Thus, because plaintiff could not establish the origin of the problems he suffered with respect to his general cognitive functioning, defendant refused to pay the rehabilitation bills." *Id.* at 616.

Beach sued for payment of the rehabilitation bills incurred, as first-party benefits, and for a declaratory judgment that State Farm was responsible for his future rehabilitation. *Id.* The jury awarded Beach \$17,500, and found that Beach was entitled to future vocational counseling, psychiatric or psychological care, and therapy for traumatic brain injury, but refused to require State Farm to pay for Beach's future physical therapy or pay a no-fault interest penalty. *Id.* On the basis of the jury's refusal to award interest, the trial court denied Beach's request for attorney fees under MCL 500.3148(1), even though the trial court concluded that the refusal to pay was unreasonable. *Id.*

We affirmed that decision. *Beach, supra* at 628. This Court honored the jury's finding that benefits were not overdue (necessarily implicit in its failure to award penalty interest), and concluded:

[W]e find that the jury's determination that plaintiff's benefits were not "overdue" for purposes of the no-fault penalty interest provision, MCL 500.3142 . . . , precluded the trial court from awarding plaintiff his attorney fees pursuant to MCL 500.3148(1) . . . because the attorney fees are only payable where personal . . . protection insurance benefits are "overdue." [*Id.* at 630.]

The caselaw is clear; where a jury fails to award penalty interest on benefits it awards at trial, those benefits are not overdue and the plaintiff's attorney is not entitled to an award of fees. *Id.*

The facts here parallel those in *Beach*. The benefits the jury awarded were not overdue. As a matter of law, under MCL 500.3148(1), plaintiff was not entitled to attorney fees, given the jury's findings.<sup>7</sup>

## B

Even if the jury verdict could be construed as having awarded penalty interest on overdue benefits not already paid before this litigation commenced, plaintiff still would only be entitled to the attorney fees attributable to the overdue benefits recovery. *Proudfoot v State Farm Mut Ins Co*, 469 Mich 476, 485; 673 NW2d 739 (2003).

In *Proudfoot*, *supra* at 478, the plaintiff's leg was amputated above the knee as a result of an accident. Home modifications were sought to accommodate her wheelchair. *Id.* State Farm refused to pay the architect's bill (\$815.10, which the plaintiff had paid) and the *estimated* cost of the home modifications (\$250,000). *Id.* The jury found that the modifications were reasonably necessary and awarded \$220,500, in addition to the \$815.10. *Id.* at 479. The trial court awarded attorney fees of \$69,300 and costs of \$7,597.23. *Id.* at 480. The Supreme Court held that the attorney fee award was erroneous. *Id.* at 485. The Court explained: "[A]ttorney fees are payable only on *overdue* benefits for which the insurer has unreasonably refused to pay or unreasonably delayed in paying. Here, *plaintiff was entitled only to those reasonable attorney fees that were attributable to the \$815.10 architect's fee.*" *Id.* (second emphasis added).

In *Proudfoot*, the \$220,500 home modifications expenses was not overdue (indeed it was not even incurred). Therefore, the Supreme Court found that the part of the attorney fee award attributable to the modification expense was erroneous. *Id.* at 485. *Proudfoot* makes it clear that where a jury awards first-party no-fault benefits, and finds that only some were overdue, an attorney fee award may only include the fee amount attributable to recovering the overdue benefits. *Id.* at 485.

In my view, *no* part of the \$79,415 in attorney fees and costs in this case was attributable to collecting the \$822.52 overdue benefit, because that overdue benefit was paid long before litigation. Nevertheless, the trial court did not even attempt to determine what portion of the attorney fee was attributable to collecting the \$822.52 in overdue benefits necessarily found by the jury.<sup>8</sup>

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<sup>7</sup> Plaintiffs rely on *Ivezaj v Auto Club Ins Ass'n*, 275 Mich App 349; \_\_\_ NW2d \_\_\_ (2007). This reliance is misplaced. *Ivezaj* only addressed whether the insurer's denial of benefits was reasonable, not whether the action was for overdue benefits. Because I would conclude that the jury's verdict necessarily indicates that there were no benefits overdue at the time litigation was commenced, *Ivezaj* does not apply here.

<sup>8</sup> Plaintiffs again rely on *Ivezaj*, *supra*, which I believe is not applicable. *Ivezaj* did not cite, discuss, or distinguish *Proudfoot*, suggesting that because *Proudfoot* cannot be overruled by this Court, *Ivezaj* addressed an entirely different issue.

Thus, under *Proudfoot*, the trial court clearly erred in awarding the full \$79,415 in attorney fees and costs. I agree with defendant that, at the very least, plaintiff is required to identify which portion of the requested attorney fees was attributable to the recovery of either an overdue benefit or the \$98.71 in interest on an overdue benefit.

### III

I would find that the trial court erred as a matter of law in granting attorney fees, because the jury did not award overdue benefits to the plaintiff. Alternatively, even if the majority is correct that attorney fees were permissible in light of the jury's verdict, the trial court erred in failing to determine what portion of the attorney fee was attributable to recovery of overdue benefits. I would reverse, or at least vacate the \$79,415 award and remand for a determination of what portion of the attorney fees was attributable to securing overdue benefits.

/s/ Kurtis T. Wilder